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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-737

PAUL WEISS,

Petitioner,

against

REVEREND MICHAEL WALSH, S.J., in his capacity as President of Fordham University; PAUL J. REISS, in his capacity as Vice-President of Academic Affairs of Fordham University; ROBERT ROTH, S.J., in his capacity as Chairman of the Department of Philosophy of Fordham University; EWALD B. NYQUIST, in his capacity as Commissioner of Education of the State of New York; JOSEPH W. MCGOVERN, EVERETT J. PENNY, KENNETH B. CLARK, CARL H. PFORZHEIMER, JR., CHARLES W. MILLARD, JR., JOSEPH C. INDELICATO, EDWARD M. WARBURG, MRS. HELEN B. POWER, JOSEPH T. KING, ALEXANDER J. ALLEN, JR., FRANCIS W. MCGINLEY, MAX J. RUBIN, THEODORE M. BLACK, STEPHEN K. BAILEY, and HAROLD E. NEWCOMB, in their capacities as Regents of the University of the State of New York,

Respondents.

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Opinions Below

The Court of Appeals for the Second Circuit rendered no opinion having affirmed the order of the District Court from the bench. The opinion of the United States District Court for the Southern District of New York is unreported and is annexed to the Appendix on page 23 thereof.

Jurisdiction

Petitioner alleges that jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

Whether this Court should exercise its certiorari jurisdiction to review a factual issue where the findings of facts made by the District Court, after a trial of the issues were unanimously affirmed by the Court of Appeals from the bench?

Statement

Petitioner's complaint filed in the District Court below alleged that he was offered the Albert Schweitzer Chair at Fordham University by a former officer of Fordham but that such alleged offer was withdrawn allegedly because of appellant's age with the tacit approval of the State respondents. At the time of the commencement of this action petitioner was sixty-nine years old. Seeking both injunctive and monetary relief under the Civil Rights Act petitioner's complaint asserted that alleged conduct of Fordham and the State defendants violate the First, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 11 of the New York State Constitution in that he was denied employment solely because of his age. Petitioner sought to buttress these alleged claims in his complaint by relying upon New York Education Law sections 239, 296, and 3027; New York Public Authorities Law, Section 2577 and federal policy as expressed in the Older Americans Act of 1965 (42 U.S.C. § 3001 *et seq.*); Executive Order No. 11141 (29 Fed. Reg. 2477 [1964]) and the 1946 Employment Act (15 U.S.C. § 1021).

Respondents thereafter moved for judgment on the pleadings pursuant to Rule 12(c) seeking to dismiss the entire complaint.

By order dated February 24, 1971 the District Court denied petitioner's application for preliminary relief and found that "the denial of a teaching position to a man approaching seventy years of age is not constitutionally infirm" under the Federal or State Constitution. *Weiss* v. *Walsh*, 324 F. Supp. 72, 77 (S.D.N.Y. 1971). However, the Court permitted petitioner to amend his complaint to plead "with greater clarity" a selective enforcement of the age criteria and an exceeding of authority delegated by statute to the Regents with respect to selection standards *id.* at 78. The order invited petitioner as well to press a claim for breach of contract *id.* at 79.

Petitioner then appealed to the Court of Appeals from the denial of his application for a preliminary injunction. In a slip sheet opinion dated October 29, 1971 that Court unanimously affirmed the determination of District Judge Tyler. *Weiss* v. *Walsh*, —— F. 2d —— Docket Nos. 71-1398, 71-1852 (2d Cir. 1971) Slip Sheet Opinion 43, 237, p. 239 (*Lumbard, Mansfield & Oakes*).*

With particular reference to petitioner's claim against the State respondents the Court of Appeals stated:

> "There remains the question of whether Weiss could prove that the decision not to nominate him for the Chair was prompted by discriminatory action on the part of the State of New York or its representatives. Here again the sole evidence proffered is inadequate. Although the correspondence relied upon by Weiss indicates that one reason for not offering

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* The slip sheet opinion was marked with a request to reporting services ("Not to Publish").

You know, we are a country that is forced-fed palpable nonsense of all kinds under the guise of constitutional doctrine. It is no more constitutional doctrine than most I know and very often when it is at least regarded by the Courts as constitutional doctrine it is far from wisdom, do you realize that? Wisdom and the law are not necessarily the same thing.

Here is an instance where wisdom and the law and a 1964 statute in the New York Legislature were pretty close to the same thing.

The motion of the State defendants for dismissal on the merits is granted without any further discussion. There is no evidence direct or indirect of any discrimination express or implied, witting or unwitting on the part of the Board of Regents or the State Commissioner of Education." (Not included in the Appendix but found on pages 652-654 in the record below.)

As noted above, the United States Court of Appeals affirmed the order of the District Court from the bench. The judgment of the Court of Appeals was entered on June 29, 1972 and the petition for rehearing *en banc* was denied on August 29, 1972.

ARGUMENT

Petitioner has presented no valid reasons for this Court to exercise its discretion in granting certiorari.

The record clearly demonstrates that the only claim of any substantive appeal petitioner alleged with respect to the State respondents was one of alleged selective discrimination against petitioner in their refusal to award him a Schweitzer Chair (A.19-A.20). This factual determination, clearly refuted by the State respondents at trial was determined in favor of respondents by the trial judge (A.46-47) and unanimously upheld by the Court of Appeals

in an affirmance from the bench. As this Court stated:

> ". . . this Court . . . rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two Courts below in the absence of a very obvious and exceptional showing of error [which is not the case here]." *Grover Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (cases cited therein) *rehearing denied*, 339 U.S. 605; *Berenzi* v. *Immigration Director*, 385 U.S. 630, 635; *American Federation of Musicians* v. *Carroll*, 391 U.S. 99, 106-107.
>
> See also: *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 509.

To be sure the record reflects that the petitioner was not even considered by Fordham University as a possible recipient of the Schweitzer Chair (A.41) and that accordingly the State respondents were not approached for their approval of petitioner.

Since petitioner's alleged constitutional claims rested solely upon the factual setting determined adversely to him it is not necessary to reach these contentions. In any event, as is particularly set forth in an earlier District Court opinion in this litigation, petitioner's constitutional claims are wholly without merit. *Weiss* v. *Walsh*, 324 F. Supp. 75 (S.D.N.Y. 1971) (A.1-A.9).

CONCLUSION

For the foregoing reasons this Court should not exercise its certiorari jurisdiction here where review turns solely upon an analysis of the particular facts involved.

Dated: New York, New York, December 15, 1972.

Respectfully submitted,

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